BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD L. LAMB	)	
Claimant	)	
	)	
VS.	)	
	)	
RAINBOW TRUCKING, LLC	)	
Respondent	)	Docket No. 1,051,966
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 1, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

This is a claim for an accident that allegedly occurred around March 30, 2010. Claimant alleges he injured his back at work when he lost his balance and jumped from the back of a truck to the ground below. In the November 1, 2010 Order the ALJ granted claimant workers compensation benefits reasoning:

> The Court finds that the [c]laimant's injury arose out of an[d] in the course of his employment. His testimony on that issue is essentially the only evidence. The Court further finds that the [c]laimant gave notice of his injury. Mr. Slack testified that he saw the [c]laimant on a day that he could not specifically identify and he looked like he was having trouble. After asking the [c]laimant what was wrong the [c]laimant reportedly said "I hurt my back'. (Slack pp. 6-7) Mr. Ritterhouse testified that he also noticed the [c]laimant favoring his back[.] He told Ritterhouse that he had hurt his back at work, but did not want to turn it in as workers compensation. (Slack p. 9) This testimony essentially verifies [c]laimant's testimony. It is the Court's opinion that the parties knew of the work injury and

> agreed not to treat it as a work injury, until such time that Blue Cross discontinued coverage under its health policy. . . .[1]

Respondent challenges those findings and requests that the Board reverse the Order. Respondent skillfully describes the inconsistencies in claimant's testimony and concludes that "claimant's story does not add up."[2] In short, respondent maintains that claimant's testimony is insufficient to prove that he sustained an injury at work. Respondent also argues that four of its management-level employees testified that claimant never advised them that he had hurt himself at work. And although two of those managers noticed that claimant was having back pain, they said claimant did not attribute his back problems to work. Accordingly, respondent contends claimant also failed to provide timely notice of the alleged injury.

Claimant asserts that he is not certain of the precise date that he injured his back, but he is certain he immediately notified one of his supervisors, Lyle Ritterhouse, about hurting his back from falling off the truck. Claimant also maintains that the next day he told respondent's owner, Gene Stos, about the accident and that Mr. Stos asked him to utilize his health insurance for his intended medical treatment. In short, claimant contends the Order should be affirmed as "respondent's witnesses are not as reliable as claimant's testimony"[3] and the ALJ was in the unique position to observe claimant and one of respondent's witnesses to testify and assess their credibility.

The issues before the Board on this appeal are:

1. Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?; and

2. If so, did claimant provide respondent with timely notice of the alleged accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

Respondent, which has around 35 employees, disassembles, moves, and assembles oil rigs for drilling companies. Claimant began working for respondent as a swamper, assisting respondent's truck drivers in tearing down and the rigs and loading

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[1] ALJ Order (Nov. 1, 2010).

[2] Respondent's brief at 8 (filed Nov. 29, 2010).

[3] Claimant's Brief at 2 (filed Dec. 20, 2010).

them onto respondent's trucks. Claimant maintains he injured his low back on or about March 30, 2010, when he lost his balance while on the back of a truck and jumped off. He purportedly landed on his feet with his knees bent and immediately experienced pain in his low back.

Claimant is not certain if the driver of the truck, Alan Depenbusch, saw the incident. But claimant asserts he promptly told his supervisor, Lyle Ritterhouse, about falling off the truck and hurting his back. Claimant contends he was offered medical treatment, but he declined as he thought his symptoms would resolve. He testified this was the first time he had experienced back problems.

Claimant alleges that on the day of incident he rode home with Cody Thorne or Thornton, one of the truck drivers at the job site, and that he told Cody his back was hurting from having fallen off truck number 103. Claimant testified Cody offered to get ice for claimant's trip home. Cody did not testify.

Claimant alleges the day after the incident he told Gene Stos, who owns respondent, about the accident and wanting to see a doctor. Claimant maintains that Mr. Stos asked him to seek payment of the medical expenses under the health insurance policy provided by respondent. Moreover, claimant contends he consented to that request as he knew the respondent was experiencing some challenges due to workers compensation claims filed by others.

On March 29, 2010, claimant attended one of respondent's safety meetings. At that meeting one of the topics covered was the importance of reporting injuries, regardless of their severity, in a timely manner. Nonetheless, claimant neither completed, prepared, nor requested an accident report for this alleged accident. He also knew that respondent required a drug test upon receiving the report of an accident. A drug test was not performed in connection with this alleged accident.

Claimant sought treatment from Dr. Michael B. Jennings, a chiropractor, for his back symptoms. Dr. Jennings's records indicate the doctor first saw claimant on March 31, 2010; claimant was seeking treatment due to an accident; and the onset of claimant's symptoms began more than a week before. At the doctor's request, an MRI was performed at Great Bend Regional Hospital in early May 2010. The history shown on the test results from that study indicates claimant sustained a trauma on April 7, 2010. There is no explanation in the record where that information originated.

There is evidence in the record that claimant's health insurance carrier eventually questioned its responsibility for claimant's medical charges at the hospital as the carrier had determined claimant's injury was work-related. Claimant testified he did not know where the insurance carrier had obtained that information. But claimant did testify that he had told Dr. Jennings about hurting his back at work. Claimant, however, does not recall

writing that fact down on any of the doctor's forms and the undersigned is unable to find any such writing in the record compiled to date.

There is a question whether claimant's alleged incident occurred on March 30, 2010. First, claimant testified he believed his first visit with Dr. Jennings (which was March 31, 2010) occurred the day after the alleged fall. But Dr. Jennings' medical records indicate the onset of claimant's condition was at least a week before. Second, respondent's records for March 30, 2010, indicate on that date claimant was initially assigned to work as a swamper or roustabout for truck number 128, not truck number 103. And, third, claimant is certain that Alan, Lyle, and Cody were with him at the job site on the day of the accident. Those three individuals may have been working somewhere else on March 30, 2010 therefore, claimant acknowledged the March 30, 2010, date might be incorrect. The record also establishes, however, that swampers jump back and forth between trucks during a work day and that respondent's records do not always show all the crews on which a swamper works during the day.

After examining claimant on March 31, 2010, Dr. Jennings took claimant off work. The off work slip, which claimant obtained from the doctor and delivered to respondent, neither specifies the nature of the injury, nor relates the injury to work. After claimant delivered the work slips to respondent, respondent's safety manager, Shane Stos, did not ask claimant if he had injured himself at work. The record indicates Dr. Jennings kept claimant off work from March 31 through April 3, 2010. Claimant testified that after returning to work he told another supervisor, Randy Slack, about hurting his back at work and that on one occasion Mr. Slack sent him home early due to his back symptoms.

Shane Stos, who is the son of Gene Stos, testified that his review of respondent's records indicated that Mr. Depenbusch, Mr. Thornton or Thorne, and Mr. Ritterhouse did not work with claimant on March 30, 2010. He also testified that he had investigated this claim and that Gene Stos and Mr. Ritterhouse denied that claimant reported an injury to them as claimant has alleged. Shane Stos acknowledged, however, that respondent had experienced a number of workers compensation claims and that he had taken the position of safety manager to reduce the number of accidents.

After the proceedings before the ALJ, respondent took the deposition of Gene Stos, among others. Gen Stos specifically denied that claimant reported a work-related injury to him. He testified that he did not learn of claimant's alleged accident until receiving a letter from claimant's attorney in September 2010. He also denied advising claimant to utilize health insurance and otherwise attempting to avoid workers compensation claims.

Randy Slack, who respondent maintains would have been claimant's supervisor on March 30, 2010, testified and denied that claimant reported a work-related accident to him. But Mr. Slack, who worked with claimant only a few times, did recall one occasion in the Spring of 2010 when claimant appeared to have back problems and upon inquiry claimant advised Mr. Slack his back was hurting. Mr. Slack recalls that claimant also mentioned

something about keeping respondent's workers compensation costs down. But Mr. Slack had no idea of the job site where that conversation occurred as he moved an oil rig almost every day. Moreover, Mr. Slack stated he would have prepared an accident report had claimant related his back symptoms to work.

Finally, Lyle Ritterhouse testified that he does not recall claimant reporting a back injury to him during the period in issue. But Mr. Ritterhouse does remember an occasion when claimant was favoring his back at work. Mr. Ritterhouse testified that claimant attributed his back symptoms to work but denied reporting the injury to Gene Stos. Moreover, claimant told Mr. Ritterhouse he was claiming the medical charges under his health insurance as he did not want to utilize workers compensation.

Following the alleged accident claimant continued working for respondent until June 2010 when he was terminated purportedly for failing to show up at work and for failing to answer respondent's telephone calls, both of which claimant disputes. But when learning there was a question about his continued employment with respondent, claimant did not contact Gene Stos as directed.

This claim hinges upon claimant's credibility. Claimant has completed the ninth grade. He has not obtained a GED. And although claimant is not the best historian, some of his contentions are corroborated by respondent's witnesses. For example, claimant maintains he did not want to claim this accident under workers compensation as he was concerned with the claims that had been made against respondent. The testimonies of Mr. Slack and Mr. Ritterhouse tend to corroborate that alleged fact. Similarly, respondent's witnesses support claimant's contention that it was not uncommon for swampers to work on different trucks and with different crews during the work day and that respondent had reason to be keenly aware of its workers compensation claim experience.

More importantly, this claim demonstrates the difficulty that the parties experience when a worker sustains an injury that is neither readily apparent to the naked eye, nor caused by some tangible object related to the job. At the time of the alleged incident, claimant merely jumped from a truck after losing his balance. It would seem that such an incident would not be considered particularly unusual. Indeed, such an incident could seem relatively innocuous, especially in the oilfields where the work is hard, dangerous, and accompanied by aches and pains.

The ALJ observed claimant testify and concluded that he was credible. Based upon the present record, the undersigned agrees. Accordingly, the undersigned finds that claimant injured his back at work on or about March 30, 2010, and that he provided respondent with timely notice of the accident. Accordingly, the November 1, 2010, Order should be affirmed.

By statute the above preliminary hearing findings are neither final nor binding as those findings may be modified upon a full hearing of the claim.[4] Moreover, this is a review of a preliminary hearing Order and, therefore, it has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated November 1, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[4] K.S.A. 44-534a.

[5] K.S.A. 2009 Supp. 44-555c(k).